A

BITART HARDWARE SDN BHD

v.

CH STEEL SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[COMPANIES WINDING-UP NO: D8-28-816-2003]
9 FEBRUARY 2006

C ***LAND LAW:*** *Caveat - Removal of - Application for - Whether respondents entitled to lodge a caveat - Whether there was fraud or improper conduct by applicants - Whether sale of land properly conducted - Whether at an undervalue - Whether there were serious questions to be tried - Whether lodging of caveat justified - Whether respondents have no*
D *caveatable interest*

The applicants, the liquidator of CH Steel Sdn Bhd (a wound up company) and HSBC Bank Malaysia Berhad ('the bank') filed an application in encl. 57 for an order that the private caveat
E presentation and any other private caveats which have been entered by the respondents in respect of the lands ('the said lands') be forthwith removed and cancelled. The applicants also prayed for a declaration that the respondents have no caveatable interest in the said land and an injunction restraining the
F respondents from lodging any further private caveats on the said land. CL Steel Sdn Bhd was the registered owner of the said land. As security for its loan, CH Steel Sdn Bhd had deposited the documents of title to the said lands with the bank and the bank had duly lodged a lienholder's caveat on the said lands. After
G CH Steel Sdn Bhd defaulted in payment of the loan, the bank appointed receivers and managers of the assets charged to the bank pursuant to a debenture executed by CH Steel Sdn Bhd and also commenced legal proceedings against CH Steel and the guarantors in the Penang High Court. A consent judgment was
H entered against CH Steel Sdn Bhd and the guarantors in the said proceedings. Pursuant to the said judgment, steps were taken by the receivers and managers to dispose off the said lands and were unsuccessful. After CH Steel Sdn Bhd was wound up at the instance of a creditor Bitart Hardware Sdn Bhd, the bank
I approached the liquidator to sell the lands. The liquidator fixed the redemption sum at 9.5 million and sold the said lands *vide* a sale and purchase agreement. Soon Cheng Kee, a shareholder of CH Steel Sdn Bhd lodged a caveat on the lands. Hence the

applicants' application to remove it on the ground *inter alia* that Soon Cheng Kee has no caveatable or beneficial interest in the assets of CH Steel. The respondents' main complaint was that the liquidator was taking instructions from the bank, an unsecured creditor, and was selling the land below market value and at a price RM1 million lower than what a purchaser nominated by them had offered.

Held (allowing applicants' application):

(1) The respondents could not maintain that that they were entitled to lodge a caveat on the lands merely because they were shareholders, contributories or guarantors of CH Steel Sdn Bhd. Dissatisfaction over the liquidator's decision to sell the land at a price that was RM1 million lower than the price that was offered by the willing purchaser was not a serious question to be tried. The offer by the nominated purchaser for RM10.5 million was in full and final settlement and satisfaction of their indebtedness included that the directors as guarantors also be absolved from their liability. The allegation of failure to act in good faith was tantamount to an allegation of fraud which allegation must be expressly pleaded and sufficiently particularized. This court did not find any instance of fraud or improper conduct of both the applicants in carrying out the sale. The nominated purchaser proposed by the company to the bank did not tender for the said property when the receiver advertised it for sale or when the liquidator again re-advertised it for sale. There were no bidders except for the machinery. In such circumstances, where all the proper steps were taken, even a registered proprietor of the land was not entitled to lodge a private caveat or complaint that the sale was at such an undervalue. (para 12)

(2) The sale herein was properly conducted after a tender exercise was carried out. The purchase price was in accordance with the forced sale value at that time. It was not correct for the respondents to say that the sale was at an undervalued price since the valuation report that they relied on was prepared way back in 1997. As such, the respondents had failed to show that the sale was at such an undervalue such as to indicate fraud so as to justify the sale being set aside. It followed that the respondents had also failed to show that there were serious questions to be tried to justify the lodging of the caveat. (paras 13 & 14)

Case(s) reffered to:

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC ***(refd)***

Hew Sook Ying v. Hew Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***

Malaysian Prestressed Concrete Stand Manufacturing Sdn Bhd & Anor v. Malaysian Ropes Sdn Bhd [1991] 3 CLJ 2096; [1991] 1 CLJ (Rep) 686 HC ***(refd)***

Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***

Noble Success Sdn Bhd v. Kiyotake Hara & Anor [1997] MLJ 300 ***(refd)***

Public Bank Bhd v. Ng Chee Ping & Anor [1999] 2 CLJ 505 HC ***(refd)***

Legislation referred to:

National Land Code, s. 323(1), (2)

For the applicants - Vinayaga Raj Ratnam; M/s Skrine & Co

For the petitioner - SS Soo; M/s Paul Ong & Assoc

For the respondent - KT Rajah Naidu; M/s KT Rajah Naidu & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Wahab Said J:

[1] CH Steel Sdn Bhd was wound up on 22 October 2003. The applicants, CH Steel Sdn Bhd's liquidator and HSBC Bank Malaysia Berhad ("the bank") filed an application in encl. 57 for an order that the Private Caveat Presentation No. 1078/2005 and any other private caveats presently unknown to the applicants which have been entered by the respondents in respect of the lands held under HSD 14941 Lot No PT 2961 and HSD 14940 Lot No PT 2960 Mukim 11 Daerah Seberang Perai Tengah, Negeri Pulau Pinang ("the said land") be forthwith removed and cancelled. The applicants also prayed for a declaration that the respondents ("Lim Ah Choo and 8 Others") have no caveatable interest in the said land and an injunction restraining the respondents from lodging any further private caveats on the said land.

[2] CH Steel Sdn Bhd is the registered owner of the said land. As security for its loan, CH Steel Sdn Bhd had deposited the documents of title to the lands with the bank and the bank had duly lodged a lienholder's caveat on the lands. After CH Steel Sdn Bhd defaulted in payment of the loan, the bank appointed receivers and managers of the assets charged to the bank pursuant

to a debenture executed by CH Steel Sdn Bhd and also commenced legal proceedings against CH Steel and the guarantors in the Penang High Court. A consent judgment was entered against CH Steel Sdn Bhd and the guarantors in the said proceedings for the amount of RM17,149,513.96. Pursuant to the said judgment steps were taken by the receivers and managers to dispose off the said lands. They were not successful. After CH Steel was wound up on 22 October 2003 at the instance of a creditor Bitart Hardware Sdn Bhd, the bank approached the liquidator to sell the lands. The liquidator with the consent of the bank fixed the redemption sum at 9.5 million and sold the lands to Tatt Giap Steel Centre Sdn Bhd *vide* a sale and purchase agreement dated 31 December 2004.

[3] Soon Cheng Kee, a shareholder of CH Steel Bhd, lodged a caveat on the lands. Hence the applicants' application to remove it on the ground *inter alia* that Soon Cheng Kee has no caveatable or beneficial interest in the assets of CH Steel. Soon Cheng Kee had relied on a "without prejudice" letter dated 1 April 2003 from the bank's solicitors to the solicitors for CH Steel and its directors or shareholders that states the market value of the land was RM27 million, as stated in a valuation report by Rahim & Co. dated 1997. The letter was written in response to a "without prejudice" proposal by CH Steel Sdn Bhd to permit the lands to be sold to a purchaser nominated by them for the sum of RM10.5 million. By that letter, the applicants contend that Soon Cheng Kee is no longer maintaining that the lands ought to be sold for RM27 million.

[4] The liquidator said that the bank was committed to redemption of the lands on payment of the sum of RM9.5 million. That purchase price was in line with the forced sale value of the lands at the relevant time. No one had bid for the lands pursuant to the tender exercise carried out firstly by the receivers and managers and subsequently by the liquidator.

[5] The applicants in their submissions said that the respondents must show that they have a caveatable interest and must produce sufficient evidence in support of their claim. If the above are fulfilled then it lies to be considered whether the balance of convenience is in their favour. The applicants said that the respondents have not shown that they have a caveatable interest. They have also not shown what interest that they are claiming on the land.

[6] The applicants submitted that there is a separation between the property of the company and that of its shareholders. Citing the case of *Noble Success Sdn Bhd v. Kiyotake Hara & Anor* [1997] MLJ 300, the applicants said that a Managing Director, shareholder do not have a right to caveat property of the company. Even a registered proprietor of a land is not entitled to enter private caveat in respect of his own land. (See *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 MLJ 504).

[7] The applicants citing *Malaysian Prestressed Concrete Stand Manufacturing Sdn Bhd (in Receivership) & Anor v. Malaysian Ropes Sdn Bhd* [1991] 3 CLJ 2096; [1991] 1 CLJ (Rep) 686 said that before the court could recognize respondents being guarantors, as having an interest to lodge a caveat, a sufficient sum of money should have been deposited by the respondents in court, or the total sum claimed should have been paid. To cap up their submissions, the applicants said that even a receiver owes no duty of care to the guarantors, (see *Public Bank Bhd v. Ng Chee Ping & Anor* [1999] 2 CLJ 505).

[8] The respondents main complaint is that the liquidator is taking instructions from the bank, an unsecured creditor and is selling the land below market value and at a price RM1 million lower than what a purchaser nominated by them had offered.

[9] In determining the issue whether the respondents have a caveatable interest I drew upon the authorities cited by the applicants. In *Noble Success Sdn Bhd the case of Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 CLJ 545 CA was referred to, where the Court of Appeal set down clearly the steps in considering whether a caveat should be sustained. The Court of Appeal said that in order to sustain a caveat, a caveator must first pass through three stages: (1) whether he has disclosed a caveatable interest in his application under s. 323(1) of the Code; (ii) if he has established a caveatable interest, then whether the evidence produced in support of this claim discloses a serious question to be tried; and (iii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit. In considering whether a caveatable interest has been disclosed, that consideration is confined to the reasons set out in Form 19B required by s. 323(2).

[10] I am in agreement with *Noble Success Sdn Bhd* that: "there is a clear separation between the property of the company and that of its shareholders. Thus a managing director, shareholder or officer of a company did not have the right to caveat the property of the company merely by virtue of their position in the company. By the same token, a person expecting to be a shareholder or even a director of a company did not *ipso facto* have a caveatable interest in the landed property of the company. In addition, it was wholly beyond the powers of the shareholders to subject the property of the applicant to a caveat. The caveat in the first place could not be sustained irrespective whether the respondents have 100% or 45% of the shareholding."

[11] *Nobel Success Sdn Bhd* also cited the case of *Hew Sook Ying v. Hew Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC where the Supreme Court held that "It is a well-established principle of law that a limited company incorporated under the Companies Act 1965 and the individuals forming the company are distinct legal entities however completely the role might be by one or more individuals of this company ... In this appeal, we must not lose sight of the fact that the company is the registered proprietor of the land ... In such circumstances, it is impossible to envisage how the managing director either personally or as a shareholder or as an officer of the company can be said to have a caveatable claim or registrable interest under s. 323(1)."

[12] It is clear from the above authority that the respondents could not maintain that they are entitled to lodge a caveat on the lands merely because they are shareholders contributories or guarantors, of CH Steel Sdn Bhd. Even assuming that they do have a caveatable interest, they would not be able to show serious issues to be tried. I do not think dissatisfaction over the liquidator's decision to sell the land at a price that is RM1 million lower than the price that is offered by the willing purchaser is a serious question to be tried. The offer by the nominated purchaser for RM10.5 million is in full and final settlement and satisfaction of their indebtedness however included that the directors as guarantors also be absolved from their liability. The allegation of failure to act in good faith is tantamount to an allegation of fraud which allegation must be expressly pleaded and sufficiently particularized. I do not find any instance of fraud or improper conduct of both the applicants in carrying out the sale. The nominated purchaser proposed by the company to the bank did

not tender for the said property when the receiver advertised it for sale or when the liquidator again re advertised it for sale. There were no bidders except for the machinery. In such circumstances, where all the proper steps are taken, even a registered proprietor of the land is not entitled to lodge a private caveat or complaint that the sale is at such an undervalue. In *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 MLJ 504 it was held that:

> (5) A chargee in exercising the power to sell under the Code owes a duty to a charger to take reasonable care to obtain the true market value of the land at the date of the sale. Such a duty flows from equity's recognition that a charger has an interest in the surplus, if any, arising from the sale. A sale at an undervalue is not automatically set aside but the undervalue may be so gross as to indicate fraud or want of proper care. (6) In this case the valuation reports in respect of the land did not express any opinion on the basis of a statutory sale by public auction. Ooi's bid was one of 11 whereby free market forces were at work. The sale was pursuant to a charge order made in a charge action and was not a private sale. Accordingly the court was not prepared to hold that the sale in this case was at such an undervalue as to indicate fraud or want of proper standards of care so as to justify the ale being set aside. (7) The chargor's remedy, if any, should be confined to a claim in damages against the chargee.

[13] Similarly, in this case, the sale was properly conducted after a tender exercise was carried out. The purchase price is in accordance with the forced sale value at that time. It is not correct for the respondents to say that the sale is at an undervalued price since the valuation report that they relied on was prepared way back in 1997. As such, the respondents had failed to show that the sale was at such an undervalue such as to indicate fraud so as to justify the sale being set aside. It follows that the respondents had also failed to show that there are serious questions to be tried to justify the lodging of the caveat.

[14] On the above premise, I allowed the applicant's application to remove the caveat, the declaration that the respondents have no caveatable interest and an injunction against the lodging of any further caveats by the respondents with costs.